

Anatomy of Settlement Facilitation

“Each facilitator has his or her own style which varies by the situation.”

Rick Wexler

*“There is a wide range of techniques and styles.
Select with care which to use when.”*

Part One - Preparation

Part Two - Session Techniques

Part Three - Closing

NOTE: Outline picks up after the referral to settlement facilitation has been made and the facilitator(s) has been selected. Anatomy is generic. Adjustments for Settlement Week, Year Round Settlement Facilitation Program, general settlement facilitation, *the circumstances of the case and personal style* are reasonable and necessary. “You” is used in this outline to refer to the settlement facilitator.

HOW TO USE THIS OUTLINE: “Anatomy” is the structure, the bare bones. The presentations and other materials of this program offer tips, traps, experiences, and expertise, to further build the process in the way which best works for you.

SKIMMING THE SURFACE: To cover 15 years of innovative experience, local practitioners would have to write a book or offer a 40 hour settlement facilitation course. Overviews are nice but, dealing with tough situations comes with practice and 1001 helpful stories. Apprenticeships once were a way to becoming a master. In contemporary society, coming together periodically for a conference may offer the best way to build upon our collective experience and expertise. These materials are only intended to help seed the discussion.

PART ONE - PREPARATION

1. “Pre-Trial Conference”

Key: A telephone conference between the facilitator(s) and counsel will help set the frame work for an effective settlement facilitation.

Topics To Cover Include:

- a. Major issues.
- b. Session format.
- c. Documents: content, deadlines, who gets a copy.
- d. How ex parte communication with facilitators will be handled.
- e. Date, time & location.
- f. Who will be there.
- g. Fees & payment.
- h. General expectations & other ground rules.

2. Briefing Documents for Facilitator(s)

Key: Educate the facilitator(s). A heads up on the context and pivotal concerns will jump start the process. Documents should be clear, concise, and organized to make it easy for the facilitator to understand the case.

Briefing documents will set the tone. Traps to avoid are submissions which are chaotic and disorganized, too minimal or massive, or *submitting none at all (a common practice)*.

The clarity, organization, and reasonableness of the written submissions speaks loudly to the facilitator(s) about that side.

Documents to Consider Include:

- a. Required information sheets.
- b. Checklists of issues, priorities, and positions.
- c. Summaries.
- d. Copies of pivotal original documents.

3. Client-Party

Key: A trap to avoid is being lost in a strange environment. People can shut down and become ineffective. The client is an essential player in the process. A well prepared client will be better able to communicate, consider what is happening, and make decisions.

Anecdotal observations by facilitators suggest that many clients are unprepared, which often compromises the effectiveness of the process and may lead to serious “buyer’s remorse.”

The same observations suggest that prepared clients are more satisfied and may achieve better results.

Areas to Address:

- a. Familiarity with settlement facilitation process.
- b. Reasonable expectations.
- c. Clarity as to own position.
- d. Clarity as to other's position.
- e. Understanding of role in process.
- f. Ability to participate (role play and practice if necessary).
- g. **Understanding of Mediation Advocacy**
 - i. This is not a trial.
 - ii. How the client and the advocate work as a team.
 - iii. What negotiation strategies to employ.
 - iv. How to be problem solving, not adversarial, while maintaining integrity.

4. Advocate

Key: Effective representation requires tailored preparation for the specific environment of settlement facilitation. This is a process where a final result may be achieved.

Anecdotal observations by facilitators suggest that some attorneys either “blow it off” as a “going through the motions exercise” or come unprepared. Settlement facilitation time is spent organizing the case, identifying issues, and probing the possible resolutions. The failure to come prepared diverts the process, makes it more expensive, and undermines the possibility for resolution. Is this practice meeting the standard of care?

Again, the same observations suggest that prepared attorneys are more satisfied and may achieve better results.

Areas to Address: *Same as for client. This is an exercise in teamwork!*

5. Between Sides

Key: If the two sides can communicate to narrow the issues, to identify keystone issues, to exchange information, and identify a host of possible paths to resolution, *then the highest and best use of settlement facilitation is possible: to foster a mutually acceptable resolution.*

Anecdotal observations by facilitators suggest that if resources are wasted at settlement facilitation by having to prepare the case for the unprepared attorney, then even greater waste takes place when settlement facilitation has to substitute for discovery because the sides were not talking with each other.

Once again, the same observations suggest that attorneys, who have cooperated before the session, are more satisfied and may achieve better results.

Areas to Address: Have an honest discussion. Ask what each side needs to be prepared to talk settlement. Ask what issues are pivotal to work on. If most cases do settle, why not support an efficient process which enhances better and earlier results?

6. Facilitator

Key: Be open to where the participants are coming from. Use the pre-trial conference and the written materials to focus upon the particulars of the case.

Areas to Address:

- a. Logistics: Seating arrangement, refreshments, caucus space, means to make a record of agreements, flip charts (easel, pads, tape), etc.
- b. Substance: Assessment from written materials and other information of issues, facts, and arguments.
- c. Process: Assessment of an initial game plan for the facilitation session.

7. Between Facilitators

Key: A few minutes discussing style and method, as well as the apparent dynamics and characteristics of the case, will set the stage.

Areas to Address:

- a. How will you start?
- b. How will you communicate about making process adjustments during the session?
- c. What style and format works best for each of you?

PART TWO - SESSION TECHNIQUES

1. Basic Approach

Key: This is an art. While there are not recipes, there are factors which make a big difference.

Essential Ingredients:

- a. Being attentive, showing genuine interest, and offering non-judgmental acceptance of each participant's own perspective (as distinct from evaluative guidance).
- b. Allowing each participant to "experience being heard," which often unlocks flexibility and collaboration.
- c. "Meeting the participants where they are," rather than to force them into your outline, adjust your outline to meet their needs.

2. Greeting the Participants

Key: Be thoughtful about how you greet and interact with each participant. Retired Judge Woody Smith has a knack of putting people at ease before anything really starts. Let your first impression to the others set the tone: "I am glad to be here. We can make progress. It is okay to be open. We may stumble at times, but we will work this out. I am glad you are here." Attitude can make the day.

3. Opening by Facilitators

Key: Set the stage, even if you have to state the obvious to be sure that everyone is thinking the same. Be succinct. Guidelines may be set up as needed. However, be thorough enough to construct a safe, working environment.

Areas to Include:

- a. Sign the confidentiality agreement.
- b. Explain the formats you will be using.
- c. Warn the participants that your job includes pushing each side: if they feel pushed during a caucus, you are not taking sides because the other side will be pushed as well.
- d. Show where refreshments, caucus rooms, and restrooms are located.
- e. Explain participants may ask for breaks.
- f. Define what in a caucus will be confidential.
- g. Explain agreements are voluntary.

4. Opening by Advocates

Key: Ask the advocates to briefly summarize the case and what could be done today. This technique allows the advocates to relieve a need to advocate, and builds a base of common information.

Tips:

- a. Keep the opening statements brief.
- b. Ask questions to clarify.
- c. Summarize what you have heard to be sure you got it and to show you were listening.
- d. Reinforce separating the people from the problem: make it a puzzle to solve together.

5. Opening by Parties

Key: Ask each party if he or she has anything to add. Get the parties engaged. If the parties elect not to participate in the opening statements, look for another opportunity.

Tips: *Same as for Opening by Advocates.*

6. Individual Sessions

Key: Some mediators/facilitators prefer to only have joint sessions. The reasoning is that if everyone sees everything, the process is cleaner. Others find that individual sessions may offer an effective opportunity to make progress.

Considerations:

- a. Be clear with the participants *before* having individual sessions, what to expect.
- b. Time sessions. Mark the start and end times on your pad. You can be sure that the party outside the room will be watching the clock. Be deliberate about how long each session will last.
- c. Let the party be heard. An individual session is an excellent opportunity for “getting it off your chest” and venting.
- d. Be aware the party in caucus will be looking to align you with them, or to have you say that he or she is right. Be careful, people will believe that you are making a judgment when you are not.
- e. A caucus is a good time to deal with where a party is stuck.
- f. Explore what is really going on.
- g. Ask the party’s advice: “How is this going for you?” “Is this helping?” “What would help?”
- h. Check out your concerns and “red flags,” such as whether the party is competent to continue. Is there sufficient information and understanding? Is there mental and emotional competency? Is the party overloaded? Does the party feel the process is unfair?
- i. Offer reality checks. Offer helpful assessment of the situation and options, without instructing the party what to do.
- j. Build clarity regarding issues, positions, bargaining, and what is happening.
- k. Offer non-judgmental acknowledgment.
- l. Follow your instincts but, be careful the individual session is not just a speech by the facilitator. A party may disengage from the process or disown the proposed resolution.

- m. This is a good time to model realistic optimism, to reframe tough issues, and to build buy-in for the process, as well as to reflect upon the alternatives to a negotiated agreement.
- n. Clarify what from the individual session is private and what may be shared with the other party.

7. Shuttle Diplomacy

Key: If the parties are separated and the settlement facilitator(s) shuttle between the two sides with proposals and counter proposals, then interference from the overt dysfunctional dynamics between the parties may be reduced.

Considerations:

- a. Be clear and accurate regarding what you are authorized to report between sides.
- b. Use the retired Judge Woody Smith technique of asking one side to guess what is the counter offer/response of the other side. Then, tell them. The surprises are educational.
- c. As you are the conveyer of offers, try to afford the “kill the messenger” syndrome.
- d. Recognize that you will be “filtering and reframing” what you convey to help each side process what is happening but, keep in mind that drifting too far off message can undermine a possible resolution. Something is always lost in transition.
- e. Do not be reluctant to bring the parties together during shuttle diplomacy. A joint session can help clarify positions and the stage of negotiations. If you have something essential to say to both, then both parties will hear the same words at the same time. You can always return to shuttle diplomacy afterwards.
- f. Avoid the trap of being an overactive messenger, where you own the process *and the content* by steering the parties towards a particular solution. Never forget “who owns the agreement” is critical.
- g. Do not be afraid to face the heat of a joint session. Some people have to walk through the fire together in order to find a creative result.
- h. Respect the additional duty of being the sole communication link between the two sides which is inherent in this powerful negotiation technique.

8. Joint Sessions

Key: Do not be afraid to experience the heat. By staying focused and working through a rough spot may demonstrate that the conflict is not a self-fulfilling fatal prophecy. Avoidance of the conflict may have been the biggest problem. Deliberate, calm persistence may find the way to the quiet after the storm.

Context: Here is where the art, experience, and expertise merge. This stage is where a 40 hour dispute resolution may be essential. Often, a co-facilitator is helpful. Monitoring the tough situation includes:

- a. The tolerance level of each participant.
- b. The safety needs of each participant.
- c. Your gut reaction to the dynamics.
- d. Your intuitive assessment of whether progress will result.

- e. Avoid returning to the parties' old patterns and cycles of conflict, unless you determine there is a strategic value for doing so.
- f. Preservation of the integrity of each participant.
- g. Be transparent to the parties about what you are doing.
- h. Watch your own reactions.

9. Time Alone

Key: Reflection time is essential, for the parties, advocates, and *settlement facilitator(s)*. Take solo time as needed. Provide the parties and advocates with time to process the experience together.

10. Breaks

Key: Taking breaks is a major tool.

Timing Considerations:

- a. "That glazed look."
- b. Need for a time out for reflection.
- c. Need to break a troubling atmosphere.
- d. Time to consult with attorney.
- e. Being emotionally overloaded.
- f. Exhaustion.
- g. Crescendoing confusion.
- h. Your need to figure things out.
- i. Need to take a walk and clear your head.
- j. Low blood sugar.

11. Cycle of Facilitation

Key: Be aware of what is going. Adjust. Be thoughtful about what technique to use. Knowingly move between types of intervention, such as being facilitative or being evaluative. Be transparent: Let people know what you are doing. Build "buy in." An art form is not a cookie cutter!

Steps to Consider:

- a. Be open to what is going on.
- b. Diagnose the situation.
- c. Consider process options.
- d. Offer an option.
- e. Ask for feedback.
- f. Adjust.
- g. Try it.
- h. Observe what happens.
- i. Repeat steps.

PART THREE - CLOSING

1. Clarify & Confirm

Key: After the energy required to achieve a break through agreement, do not forget the “devil” in the details.

Considerations:

- a. What is being agreed to.
- b. How the agreement will be implemented.
- c. Who will do what.
- d. What is the record of the agreement, and make one if necessary.

2. Reality Check

Key: Ask questions to explore the consequences of the terms of agreement. Help the agreement “stick” by making the extra effort to look ahead.

3. Help with Closure

Key: Determine whether the facilitator(s) will involved with drafting problems or issues which come up after the session and before the agreement is final.

4. Acknowledgment

Key: Help the resolution stick by thanking the parties for their hard work. Feedback from the facilitators has an important impact.

5. Fill out and turn in the Outcome/Evaluation Reports.

Settlement Information Sheets

A Golden Opportunity. Attorneys sometimes just list the issues as “custody, alimony, property, and debts.” Does this description really tell the facilitator anything? Why not concisely tell the story and give the facilitator a sense of the case? One family law example is shown below.

SETTLEMENT FACILITATION INFORMATION SHEET

Petitioner, Wife, by Attorney, states:

1. **Date of Marriage:** 00/00/00

2. **Date of Separation:** 00/00/00

3. **Date of Divorce:** N/A

4. **Names and Ages of Parties:**

Mother: Wife, age 00

Father: Husband, age 00

5. **Current Occupation and Annual Income:**

Mother: Homemaker, no income

Father: Chief Executive Officer
Company, Inc.
\$000,000/year

6. **Names and Ages of Children of this Marriage:**

Daughter, age 00, born 00/00/00

Son, age 00, born 00/00/00

7. **Marital Estate:**

Assets: \$00,000,000

Debts: \$00,000

See attached Asset & Liability Worksheet

8. **Description of relief sought:** There are two major issues which settlement facilitation could help resolve: custody and alimony. The difficult issue of property division has been resolved.

If break-throughs are achieved in these two areas, Wife believes it should be possible to resolve all of the remaining issues.

9. **Factual & Legal Issue - Custody.** The pivotal issue is whether Wife's home should be the children's base home, as recommended by Expert.

The parties had children late in life, choosing to work full time to support Husband's career for 00 years. Daughter attends elementary school. Son is in pre-school.

Wife has been the only active parent the children have known. Before separation, Husband traveled extensively and when he was in Albuquerque, he came home late at night, if at all. During the lengthy separation, Husband resided with his "fiancee" out of state, and Wife remained in the family residence and cared for the children. Now, Husband seeks to have the children alternate between two residences: fall semester with Husband, and spring semester with Wife.

Expert performed a psychological custody evaluation. Expert found Wife to be too possessive of the children and found her proposed time sharing schedule to be too restrictive of the children's time with Husband. Wife has accepted Expert's recommendations, has enrolled in the suggested parenting classes and counseling, and has agreed to Expert's recommended time sharing schedule to make sure the children begin to have a relationship with Husband.

Expert recommended one base home for the children with Wife. The children are too young to be separated for extended periods of time from the only active parent they have ever known, Expert finds. Husband disagrees and seeks a second opinion.

10. **Factual & Legal Issue - Alimony.** Wife is requesting alimony. Her career has been CEO's active wife, homemaker, and active

parent. She does not have the cash flow to continue the established lifestyle of the children, let alone support herself.

Wife consulted with Evaluator, a vocational expert, with the agreement of Husband, to explore her options. Enclosed is a copy of his report. Evaluator has recommended... While Husband led Wife to have higher expectations, Wife will accept Evaluator's recommendations. Husband will not.

Husband believes his career is his own, despite his acknowledgment of Wife's full time supporting role. Husband believes Wife should make it on her own, just as he did.

11. **List of all remaining discovery:** Ongoing discovery will include several depositions and discovery motions.

12. **List of any pending dispositive motions:** None pending at this time.

13. **Estimate of costs and attorney fees through trial:** Substantial, at least \$00,000.

14. **The last offer made to other party:** Wife agreed to accept recommendations of Expert and Evaluator. See attached letter dated 00/00/00.

15. **Copies of case law, statutes, pleadings, exhibits, orders and any other information which would be helpful to the facilitators:** Attached is ...

ATTORNEY